(3)

No. 91-657

Supreme Court, U.S.
FILED
JAN 7 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

VINCENZO RIVERSO, PETITIONER

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

GEORGE EDELSTEIN
605 W. 112th St. #5B
New York, NY 10025
(212) 662-4771

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 91-657

VINCENZO RIVERSO, PETITIONER

v.

UNITED STATES OF AMERICA.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

The government does not attempt to demonstrate that the record supports any of the court of appeals' evidentiary conclusions we challenge. Summary reversal, therefore, is warranted.

1. The government's argument that the court correctly concluded that the proof showed the single conspiracy the indictment alleged (Br. in Opp. 5-6), is flawed. First, the government's argument, like the court's reasoning it repeats (Pet. App. 4a-5a), is

entirely circular. Its argument (Br. in Opp. 5) reduces to this: the conclusion that there was a single conspiracy, the Spavento network, is correct because there were two conspiracies that supplied the single conspiracy, the Spavento network. Moreover, contrary to the government's (and the court's) reasoning, the proposition that Riverso participated in both supply conspiracies (a proposition the government does not establish on the basis of the evidence in any event, see the next paragraph) does not justify the conclusion that the single Spavento network existed. The customers of a common supplier are not, for that reason, a single enterprise.

Second, the government relies on the evidentiary conclusions we claim are unsupported without attempting to show that the record supports them or acknowledging our claims. The court concluded that Riverso was involved in Modica's and Miceli's supply operation and in the swap scheme (Pet. App. 5a),

and we have challenged both conclusions on the ground that there is no evidence to support them. Pet. 11-12. The government offers no record support for either conclusion. But it argues that the court correctly concluded that there was a single conspiracy because, it says (Br. in Opp. 5), "[a]s the court explained, both operations served as sources of supply for a single network operated by Spavento; [and Riverso was] involve[d] in both. Id. at 4a-5a." (The court, at the cited pages, refers to Modica's and Miceli's supply operation and the swap scheme.)

Third, the government supports its assertion that the swap scheme actually operated by attributing a concession to Riverso he never made. It says Riverso "contended [thus conceding] in the court of appeals that there were two separate conspiracies (one to distribute drugs in this country and one to sell cocaine for heroin in Italy) ...". Br. in Opp. 5. Riverso, however, did not concede

that the swap scheme operated, but argued, as he does here, that it did not. In the court below (C.A. Br. 21), Riverso, acknowleding that "[t]here is evidence that some defendants spoke about the prospect of smuggling cocaine to Europe and returning with heroin," argued that "there is no evidence that any of these discussions resulted in action toward that end." (The discussions are summarized at page 7 of the petition.)

Finally, the government does not respond to our claim (Pet. 10-11) that it is irrational to conclude that Spavento with Riverso's help managed the single conspiracy the indictment alleged, where there is no evidence connecting Spavento to the vast majority of the alleged conspirators' sales and no evidence connecting Riverso to any of them.

2. The court's determination that Riverso participated in the charged conspiracy, we contend (Pet. 12), cannot be sustained because there is no record support for its

underlying evidentiary conclusions, namely: that Riverso participated in (1) drug sales to Agent Caruso and (2) the use of Jerry Mark as a cocaine smuggler and (3) "acted as Spavento's representative in these transactions," the latter serving, in the court's view, to "connect Riverso to Spavento's activities and thus to the charged conspiracy." Pet. App. 16a.

The government does not defend the court's conclusions that Riverso sold drugs to Agent Caruso and that Riverso acted as Spavento's representative when he dealt with Mark. Instead, it argues, though not expressly, that Riverso's conviction can be sustained on other grounds.

Riverso's participation in the conspiracy, the government argues, is shown by his participation in an attempted drug sale to Agent Caruso (which the court did not mention) and by a "connection" between the swap scheme and the Spavento network (Br. in Opp. 6-7)

(which the government did not advance below). The record, however, contradicts the arguments.

a. The government contends that the July 31, 1987, transaction involving Agent Caruso was a drug sale the conspirators canceled. Br. in Opp. 4, 6. But it also contended before the jury that the transaction was not an attempted sale but an attempted larceny of the agent's cash, as Riverso contended. On rebuttal summation, responding to Spavento's argument that he sold drugs to Agent Caruso only to help a friend, the government asked, rhetorically: "[w]hy on July 31st did Mr. Spavento try to steal $100,000 from Agent Caruso?" Tr. 9731.

That view of the transaction is confirmed by the recorded conversation among Agent Caruso, Mazzerino and Riverso. When Mazzerino told Agent Caruso, "I count [your] money and I look at the stuff [heroin] before you do," Agent Caruso said "you guys speak Italian and

I don't know where I'm at." GX 1110B, at 11. Riverso replied, "... if the money [is] in my hand's, it's like [Spavento] has it or you have it." Ibid. Then, when Agent Caruso said "I'm comfortable with [Spavento], I know him," Riverso said, "I been with [Spavento] for 20 years." Id. at 12-13.

In addition, Agent Caruso's contemporaneous account of the incident and his trial testimony show that he did not believe anyone was going to sell him heroin on July 31st. Two weeks later Agent Caruso told defendant Modica, "I got jacked around the whole week. ... [Spavento] says come back tomorrow, I go back tomorrow the guy didn't show ...". GX 1113B at 18-19. And Agent Caruso testified that he was being "jerked around" on July 31st. Tr. 5460.

Finally, to support its argument that Riverso participated in drug sales the government attributes another concession to Riverso he never made. It says Riverso contends in

this Court that "there were several sales to undercover agents in which [he] did not participate, ..." (Br. in Opp. 6), implying the concession that he participated in some sales. But Riverso claims that he did not participate in any drug sales (see, Pet. 8, 11), a claim confirmed by the government's inability to identify one.

b. The significance of Riverso's transaction with Jerry Mark, according to the court below, was that it connected Riverso to the Spavento network, a conclusion it based on its determination that Riverso was acting as Spavento's representative or agent. Pet. App. 16a. As we mentioned, the government does not defend that determination, but advances, apparently as a substitute, a different argument to demonstrate a different connection. Before turning to the government's argument, we make three brief observations about its evidentiary claims.

The government asserts, in effect, that Riverso knowingly participated in the exportation of cocaine (Br. in Opp. 6) (an offense the indictment does not charge). That, by itself, would not support a finding that Riverso was a member of the conspiracy charged in this case. Nonetheless, it seems useful to represent that there is nothing in the pages of Mark's testimony the government cites (or anywhere else in the record) to show either that Riverso knew what was in the package Mark said he gave him or that Riverso knew that Mark smuggled drugs on his trips to Europe.

In addition, the government asserts that the transaction shows that Riverso participated in the swap scheme. Br. in Opp. 6. But it does not point to anything in the record to show that the package Mark said he gave Riverso was, or was intended to be, swapped for heroin, by definition a showing necessary to support the assertion.

And the government represents, incorrectly, that Riverso concedes that the swap scheme operated and that he participated in it. According to the government, Riverso "argues (Pet. 11-12) that his participation in the swaps did not show his participation in the conspiracy ...". Br. in Opp. 6. But no such argument appears in the petition.

The government argues that there was a connection between the swap scheme and the Spavento network (Br. in Opp. 6-7), although it never demonstrates that there is evidence in the record that proves the existence of either one. The connection is established, the government maintains, by Riverso's statement to Mark "that he [Riverso] was having difficulty paying Mark because there were problems with 'the business' ...". Id. at 7. From this the government argues that since Riverso was involved in the Spavento network it is reasonable to infer that Riverso's ref-

erence to "the business" was a reference to the Spavento network.

The logic of the argument, which is questionable, need not be debated because its essential factual premise is refuted by the record, indeed, by the government itself.

The connection the government argues for depends entirely on the accuracy of its representation that Mark's testimony establishes that Riverso was the one who owed Mark money and was going to pay him. If Riverso was giving Mark money on behalf of another, then Riverso's reference to business problems as the excuse for not paying Mark would have been to that person's business, not to a business in which Riverso was involved.

That, in fact, is precisely the import of Mark's testimony. On direct examination Mark said that "Mr. Riverso gave me $500 that he said came from Mr. Fiumara, and that he said that there would -- Mr. Riverso said that more money will follow, to be patient, that they

have had problems in the business and things weren't working well. ... Mr. Riverso would say, don't worry about getting me [my?] money, Mr. Fiumara would guarantee that I would get the money ...". Tr. 784-785.

Then, on redirect examination, the government eliminated any doubt about who owed Mark the money and who was going to pay Mark and, therefore, who was having business problems. The government asked Mark if he recalled being asked on cross-examination whether Riverso would pay him. Defense counsel objected because, he said, "[h]e was talking about Mr. Fiumara." The government responded, "That is precisely my point." Tr. 1068-1069. It is also Riverso's.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court of appeals affirming Riverso's conviction should be reversed.

Respectfully submitted.

GEORGE EDELSTEIN
605 W. 112th St. #5B
New York, NY 10025
(212) 662-4771

January 1992